Office-Supreme Court, U.S.
FILED
MAY 30 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1695

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

COUNTY OF MULTNOMAH, a home rule subdivision of the State of Oregon, and THE CITY OF PORTLAND, OREGON, a political subdivision of the State of Oregon,

Petitioners,

v.

ACKERLEY COMMUNICATIONS, INC., a Washington corporation,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED

Whether under 42 U.S.C. § 1988, which Congress enacted with the intent that successful civil rights plaintiffs would be awarded their reasonable attorney fees unless special circumstances would render such an award unjust, either of the following is a "special circumstance" which would make it unjust to award attorney fees to the plaintiff:

1. The plaintiff can afford to hire private counsel and would have chosen to litigate even if § 1988 had not made possible the recovery of attorney fees?

2. The plaintiff has a financial interest in the outcome of the litigation and challenges the validity of an ordinance on several statutory and constitutional grounds, leading the court to assume that the plaintiff's primary motive in challenging an unconstitutional ordinance was its own financial interest rather than

a concern for the vindication of constitutional rights in the abstract?

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Seattle School Dist. No. 1 et al. v. State of Washington, 633 F.2d 1338 (9th Cir. 1980), aff'd 458 U.S. 457 (1982) 10,14

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587 F.2d 159 (5th Cir. 1978) (en banc), aff'd. 445 U.S. 308 (1981) 18,19

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S. Rep. No. 1101, 94th Cong., 2d Sess. (1976), reprinted in 1976 U.S. Code Cong. & Adm. News 5908 11,12,13

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Respondent accepts petitioners' statement of the parties to the proceeding, their citations of the opinions below, and their statements as to jurisdiction and the statutory provision involved.

RESPONDENT'S STATEMENT OF THE CASE

In these consolidated actions respondent[1] contended that each of three local ordinances which purported to regulate outdoor advertising signs was invalid. Respondent alleged from the outset that each ordinance violated the First Amendment to the United States Constitution in addition to alleging other federal claims and pendent state claims (Case No. 75-733, CR 1, 17; Case No. 76-373, CR 1). In each case respondent

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[1]The actions were originally filed by respondent's predecessor in interest, Foster and Kleiser. By stipulation, Ackerley Communications, Inc. was substituted as plaintiff after it purchased outdoor advertising signs which had belonged to Foster and Kleiser. The terms "respondent" and "plaintiff" are used in this brief without distinguishing whether the plaintiff at the relevant time was Foster and Kleiser or Ackerley Communications, Inc.

Corporate affiliates of Ackerley Communications, Inc. are listed, pursuant to Rule 28.1 of the rules of this Court, in Appendix C to this brief.

also alleged, from the outset, that its outdoor advertising signs are used for both commercial and noncommercial messages, including political messages, and that enforcement of the ordinances would prevent its display of political and noncommercial messages (*id.*). Shortly after the actions were filed, respondent obtained preliminary injunctions against the enforcement of the ordinances (Case No. 75-733, CR 8; Case No. 76-373, CR 9). From the outset respondent argued that each ordinance was invalid under the First Amendment.[2]

The district court's final judgments on the merits held that all provisions of the ordinances which prohibited the erection of, or required the removal of, outdoor advertising signs were void. The

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[2]Early in the proceedings it cited, among other authorities, the trial court decision in the case which this Court eventually decided in *Metromedia Inc. v. City of San Diego*, 453 U.S. 490 (1981) (Case No. 76-373, CR 3 at p. 5).

court permanently enjoined the enforcement of those portions of each ordinance (Appendices A and B to this brief).

The district court's opinion on the merits describes the proceeding as "primarily a constitutional challenge" to the three ordinances (Petition, App-28, ¶ 29). The court held that the Multnomah County ordinance violated the First Amendment in two ways and that it picked out political signs for especially harsh treatment (Petition, App-35-38). The City of Salem ordinance was invalid because, without explanation or justification, it provided greater protection to commercial than to noncommercial speech and singled out political signs for special prohibition (Petition, App-39-42). The City of Portland ordinance was unconstitutional because it afforded greater protection to commercial speech than to noncommercial

speech, prohibiting public service signs in areas where commercial signs would be allowed (Petition, App-42-44).

After judgment in its favor on the merits, respondent sought to recover its reasonable attorney fees pursuant to 42 U.S.C. § 1988. The district court refused to award any attorney fees on the ground that there were special circumstances which would render such an award unjust (Petition, App-21). Those circumstances, as identified by the district court, were: (1) plaintiff's primary objective in the litigation was not to protect the right to political or noncommercial speech but to prevent the enforcement of ordinances which threatened plaintiff financially (Petition, App-23); the First Amendment issue was only one among many (Petition, App-24); (2) an award of attorney fees would not further the statutory purpose because plaintiff would have initiated the actions whether or

not it could expect to recover attorney fees (Petition, App-25); (3) invalidation of the ordinances primarily benefited the plaintiff (Petition, App-26); (4) the equities favored defendants because defendants' litigation and other strategies would "undoubtedly" have been different if they had expected to pay plaintiff's attorney fees, because "[g]overnmental entities should not be intimidated in their functionings by the threat of attorney's fees," and because plaintiff did not seek a rapid determination of the First Amendment issues (Petition, App-26, 27).

The United States Court of Appeals for the Ninth Circuit held that none of the factors identified by the district court was the kind of "special circumstance" which would justify the denial of all attorney fees to a successful civil rights plaintiff. Specifically, the court held that (1) neither a financial interest in or

financial motivation for the litigation nor the fact that plaintiff asserted other grounds for the invalidity of the ordinances was an appropriate reason to deny all attorney fees (Petition, App-6-8); (2) the right to recover attorney fees under § 1988 is not limited to plaintiffs who would not have chosen to litigate without the prospect of recovering attorney fees (Petition, App-8, 9); (3) the fact that the plaintiff is the primary beneficiary of its own success is not a valid reason for denying attorney fees to a plaintiff whose litigation may serve to stimulate future voluntary compliance with the law and who has vindicated rights having social importance (Petition, App-10-12); (4) the district court had improperly balanced the equities because it had not taken into account the Congressional purpose to encourage future constitutional litigation and voluntary

compliance with the law (Petition, App-12-13).

ARGUMENT

I. The Writ Should Be Denied Because Petitioners' Contentions of Error and of Importance Are Based on Mistaken Assumptions.

Petitioners do not challenge the Ninth Circuit's holding that the district court misunderstood the purposes of 42 U.S.C. § 1988 and improperly balanced the equities as a result. Nor do they challenge the Ninth Circuit's holding that attorney fees may not be denied on the ground that plaintiff was the primary beneficiary of its own successful litigation. They rely on only two of the four reasons given by the district court to justify its refusal to award attorney fees.

In each instance petitioners' argument is based on a mistaken premise. Their first argument is based on much too narrow

an understanding of the purposes which Congress intended 42 U.S.C. § 1988 to serve. Their second argument is based on a misunderstanding of the district court's reasoning. The Ninth Circuit correctly understood both the Congressional purpose and the district court's opinion and rendered a decision which is correct and is consistent with Congressional intent and with the decisions of this and other courts.

II. The Petition Ignores the Congressional Purpose to Encourage Private Enforcement of Civil Rights by Creating a Right To Recover Attorney Fees.

The district court concluded that an award of attorney fees in this case would not further the purposes of § 1988 because the plaintiff was able to afford competent counsel and would have initiated legal action against these defendants without regard to the possibility of recovering

attorney fees (Petition, App-25). The statutory purpose, the district court believed, was to enable citizens who could not otherwise afford to vindicate their civil rights to do so through litigation (*id.*). Petitioners, like the district court, have assumed that that was Congress's only purpose in enacting the statute. It was not.

The purpose of § 1988 was not only to "eliminate financial barriers to the vindication of constitutional rights," but also to "stimulate voluntary compliance with the law." *Seattle School Dist. No. 1 et al v. State of Washington*, 633 F.2d 1338 (9th Cir. 1980) aff'd 458 U.S. 457 (1982).[3] The legislative history establishes that Congress intended § 1988 not only to assist civil rights plaintiffs who would not

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[3]Petitioners have quoted this same passage as a correct statement of the statutory purpose (Petition, 19) but their argument ignores its implications.

otherwise be able to afford to litigate but also to encourage vigorous enforcement of civil rights laws without creating an unnecessarily large governmental enforcement bureaucracy. S. Rep. No. 1011, 94th Cong., 2d Sess., 4 (1976), reprinted in 1976 U.S. Code Cong. & Adm. News 5908, 5911. In order to accomplish that purpose, Congress chose to compensate successful "private attorneys general" for the cost of civil rights litigation unless special circumstances made that compensation unjust in the particular case. *Id.* at 4-5; 1976 U.S. Code Cong. & Adm. News at 5912. The award of attorney fees was intended to be an entitlement in all but exceptional cases and to be an integral part of the remedy:

> "In several hearings held over a period of years, the Committee has found that fee awards are essential if the Federal statutes to which [§ 1988] applies are to be fully enforced. We find that the effects of such fee awards are

> ancillary and incident to securing compliance with these laws, and that fee awards are an integral part of the remedies necessary to obtain such compliance." *Id.* at 5; 1976 U.S. Code Cong. & Adm. News at 5913 (footnote omitted).

Where, as in this case, the appropriate remedy is injunctive relief against enforcement of an invalid law or ordinance rather than money damages, the provision for recovery of attorney fees is especially important. It does, of course, enable plaintiffs of limited means to litigate. In addition, however, it serves the important purpose of encouraging others with more resources to allocate some of those resources to civil rights litigation which benefits others as well as themselves:

> ". . . If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the Federal courts. . . ." *Id.* at 3; 1976 U.S. Code Cong. & Adm. News at

5910, quoting from *Newman v. Piggie Park Enterprises, Inc.*, 290 U.S. 400, 402 (1968).

Moreover, the prospect of having to pay the plaintiff's reasonable attorney fees provides a financial incentive to government to avoid actions which could violate the rights of its citizens and to avoid persisting in unconstitutional activity when its attention is called to violations of civil rights.

Recognizing these broader purposes of § 1988, the circuit courts of appeal have held or assumed that attorney fees pursuant to § 1988 may not be denied on the ground that the plaintiff was financially able to retain competent counsel. *See, e.g., International Oceanic Enterprises, Inc. v. Menton*, 614 F.2d 502 (5th Cir. 1980) (abuse of discretion to deny fees on ground that plaintiff was affiliated with a wealthy corporation which was able to pay private counsel); *Universal Amusement Co., Inc. v.*

Hofheinz, 616 F.2d 202 (5th Cir. 1980) (no special circumstances which would warrant denial of attorney fees although plaintiffs were nineteen businesses); *Entertainment Concepts, Inc. III v. Maciejewski*, 631 F.2d 497 (7th Cir. 1980) *cert. denied* 450 U.S. 919 (1981) (abuse of discretion to deny fees to movie theatre owner which successfully attacked zoning ordinance which would have prevented showing of "adult" movie in plaintiff's theatre); *Seattle School Dist. No. 1 et al. v. State of Washington*, 633 F.2d 1338 (9th Cir. 1980) *aff'd* 458 U.S. 457 (1982) (abuse of discretion to deny fees on the ground that award was not necessary because the prevailing parties were publicly funded).

Although this Court has not addressed the issue directly, it has impliedly held that attorney fees should not be denied on the ground that the prevailing party would have chosen to litigate without the

prospect of recovering fees. In *Hutto v. Finney*, 437 U.S. 678, 694-5 n. 23 (1978), rehearing den. 439 U.S. 1122 (1979) this Court held that § 1988 was applicable to cases filed before its enactment when those cases remained pending on its effective date. In many such cases the action must have been filed without the expectation that fees would be recovered.[4]

The Ninth Circuit's holding in this case that fees could not be denied because plaintiff's decision to litigate did not depend on the prospect of a fee award under § 1988 and because it could afford to hire competent counsel is neither novel nor improper. Rather, that holding is consistent with the avowed Congressional purpose, with assumptions underlying this

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[4]In some cases filed before this Court's decision in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1974) the plaintiffs may have hoped for fee awards under the equitable theories which that decision rejected.

Court's decision in *Hutto v. Finney*, *supra*, and with prior decisions in the same and other circuits.

III. The Petition Ignores the District Court's Mistaken Reliance on Plaintiff's Financial Objectives.

Part II of petitioners' argument (Petition, 23-29) mistakenly assumes that the district court refused to award attorney fees to plaintiff on the ground that its success in these actions was limited or merely technical. Plaintiff's success, however, was complete; the district court did not conclude otherwise.

Plaintiff sought declaratory relief and an injunction against the enforcement of each defendant's ordinance purportedly regulating or banning certain outdoor advertising signs; one of its stated reasons was that the terms of those ordinances violated rights of free expression guaranteed by the First

Amendment. The relief which plaintiff sought is precisely the relief it obtained in each case (Appendices A and B to this brief). Contrary to the assertions in the petition, plaintiff never contended that defendants were without power to regulate its sign structures at all. Plaintiff argued, rather, that the forms of attempted regulation which defendants had chosen were constitutionally impermissible. The district court agreed.

In denying plaintiff's request for attorney fees, the district court never said that plaintiff's success in these actions was limited or merely technical. Rather, as the Ninth Circuit correctly recognized, the district court's "primary reason" for refusing to award attorney fees was its belief that plaintiff's motive or major objective was to protect its own financial interests (Petition, App-23).

The Ninth Circuit correctly held that a civil rights plaintiff's financial interest in the outcome, whether or not that interest determines plaintiff's primary motive or objective,[5] is not a "special circumstance" which will justify withholding attorney fees under § 1988. In support of that holding it cited *Universal Amusement Co. v. Hofheinz*, 616 F.2d 202 (5th Cir. 1980) *mod. and remanded on other grounds* 646 F.2d 996 (5th Cir. 1981) (reversing denial of fee award to plaintiffs who successfully challenged constitutionality of ordinances which would have prohibited the operation of their businesses in certain locations); *Universal Amusement Co., Inc. v. Vance*, 587 F.2d 159 (5th Cir. 1978) (en banc), aff'd 445 U.S.

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[5]The record contains no factual support for the district court's conclusion about plaintiff's motives. Those motives were never put in issue. The district court's conclusion must have been entirely subjective and speculative.

308 (1981) (adult movie theater owners entitled to fee when they successfully challenged constitutionality of nuisance statute as applied to obscenity); and *Sethy v. Alameda County Water District*, 602 F.2d 894 (9th Cir. 1979), *cert. denied* 444 U.S. 1046 (1980) (plaintiff who received personal damage award and reinstatement to employment was entitled to a fee).

Defendants have not suggested that those cases, and others with similar holdings, were incorrectly decided. See, e.g., *International Oceanic Enterprises, Inc. v. Menton*, 614 F.2d 502 (5th Cir. 1980) (abuse of discretion to deny attorney fee award on ground that the case involved "basically financial interests"); *Entertainment Concepts, Inc. III v. Maciejewski*, 631 F.2d 497 (7th Cir. 1980), *cert denied* 450 U.S. 919 (1981) (abuse of discretion to deny fees to movie theatre owner which successfully attacked zoning

ordinance which would have prevented showing of "adult" movies in plaintiff's theatre).

In summary, the Ninth Circuit correctly identified the district court's primary reason for refusing to award attorney fees. Having done so, it correctly held that financial motivations are irrelevant under § 1988. Its decision is consistent with those of other circuits.

The district court attempted to distinguish such decisions on the ground that, at least in one instance, the constitutional issue was "central to the case and crucial to the survival of the plaintiffs" whereas, in this case,

> ". . . the issue of whether the ordinances violated the First Amendment is one issue among many." (Petition, App-24)

However, as the Ninth Circuit correctly noted, the presence of other issues is not an appropriate reason for denying attorney fees:

> "Litigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not sufficient reason for reducing a fee. The result is what matters." Petition App-8, quoting *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983).

In this case the result was totally favorable to plaintiff. The district court held for plaintiff on the only issues it had to decide. As a result plaintiff obtained all the relief which it had requested and the court did not have to reach additional constitutional and statutory issues. If that is not a reason to reduce a fee, it is certainly not a proper reason to refuse to allow any attorney fee at all.

CONCLUSION

The United States Court of Appeals for the Ninth Circuit, in holding that the district court abused its discretion in this case, has not announced any new principles of law. Petitioners have not

contended that the decision conflicts with any decision of this Court or those of any other circuit. The Ninth Circuit's decision properly applies § 1988, in light of clear Congressional purposes, to the specific facts of this case. Petitioners have not shown that the decision is incorrect or that the court's rationale contains anything which is likely to lead to improper results in other cases. The decision challenged by petitioners simply holds that, upon the facts of this case, it would not be unjust to require that petitioners pay a reasonable attorney fee to a plaintiff who has incurred such fees to establish through litigation that the

petitioners' ordinances violated the First Amendment. Review of that decision by this Court is not required.

SCHWABE, WILLIAMSON, WYATT,
MOORE & ROBERTS
DONALD JOE WILLIS
MILDRED J. CARMACK

By: _____
Donald Joe Willis
Counsel of Record
Of Attorneys for
Respondent

APPENDIX "A"

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

ACKERLEY COMMUNICATIONS, INC., a Washington corporation; Plaintiff; v. THE CITY OF SALEM, OREGON, a municipal corporation; Defendant; COUNTY OF MULTNOMAH, a home rule subdivison of the State of Oregon; Intervenor.	)	Civil No. 75-733-FR FINAL JUDGMENT

Based on the Opinion and Order dated June 23, 1982,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. Those portions of Salem Sign Code, Chapter 62, specifically including Sections 62.508, 62.510, 62.515, 62.516, 62.517, 62.518, 62.525, 62.530, and 62.540, and any other provisions incorporated into other ordinance sections within or without

Chapter 62 by virtue of the definitions in Sections 62.050(t)(1) and (9) or 62.060(m) of Chapter 62, (or the same provisions if now or later renumbered), which purport to prohibit the erection or maintenance of, or cause the removal of, "advertising sign(s)," "outdoor advertising sign(s)," "political sign(s)," or "sign(s)," insofar as the term "sign" includes any of the foregoing definitions, are declared void.

2. Those portions of Multnomah County Ordinance No. 100 now known as Multnomah County Code (MCC), specifically including MCC 11.15.8605 through MCC 11.15.8645 and any other provisions incorporated by virtue of the language in MCC 11.15.8645, which purport to prohibit the erection or maintenance of, or cause the removal of, "outdoor advertising sign(s)" or "political sign(s)," are declared void.

3. Those portions of the Salem Sign Code and the Multnomah County Code referenced above which purport to require the uncompensated removal of lawfully erected outdoor advertising signs within the areas covered by the Highway Beautification Act of 1965 (23 U.S.C.A. § 131) as amended are declared void.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the City of Salem, its officers, agents, attorneys, and any others acting in concert with it or them, are hereby permanently enjoined from directly or indirectly enforcing or attempting to enforce the portions of the Salem Sign code declared void herein.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the County of Multnomah, its officers, agents, attorneys, and any others acting in concert with it or them are hereby permanently enjoined from directly or indirectly enforcing or attempting to

enforce those portions of the Multnomah County Code declared void herein.

The court will determine the right of plaintiff to attorneys' fees upon motion and hearing, provided that any such motion shall be filed within 20 days of the entry of this Final Judgment.

DATED this 30 day of August, 1982.

/s/ Helen J. Frye
Helen J. Frye
United States District Judge

APPENDIX "B"

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

ACKERLEY COMMUNICATIONS, INC., a Washington corporation; Plaintiff; v. THE CITY OF PORTLAND, a political subdivision of the State of Oregon; Defendant.	)	Civil No. 76-373-FR FINAL JUDGMENT

Based on the Opinion and Order dated June 23, 1982,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

1. Those portions of the Code of the City of Portland, Oregon, Chapters 32 and 33 specifically, including Sections 33.74.020, 33.74.030, 33.74.040, 33.74.060, 33.74.080, and 33.44.130(e)(5), and any other provision or provisions incorporated in said chapters by virtue of the definitions contained in Sections 32.04.210 or 32.04.020 (insofar as

the latter section includes the former) which purport to prohibit the erection or maintenance of, or requires the removal of, "outdoor advertising sign(s)" or "sign(s)" (insofar as "sign(s)" includes "outdoor advertising sign(s)"), are declared void.

2. Those portions of the above-referenced ordinances which purport to require the uncompensated removal of lawfully erected outdoor advertising signs within the areas covered by the Highway Beautification Act of 1965 (23 U.S.C.A. § 131), as amended, are declared void.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the City of Portland, its officers, agents, attorneys, and any others acting in concert with it or them are hereby permanently enjoined from directly or indirectly enforcing or attempting to enforce the ordinances declared void herein.

The court will determine the right of plaintiff to attorneys' fees upon motion and hearing, provided that any such motion shall be filed within 20 days of the entry of this Final Judgment.

DATED this 30 day of August, 1982.

/s/ Helen J. Frye
Helen J. Frye
United States District Judge

APPENDIX "C"

RESPONDENT'S CORPORATE AFFILIATES

Ackerley Communications, Inc.,
a Delaware corporation
Ackerley Airport Advertising, Inc.,
a Washington corporation
Ackerley Communications of Florida, Inc.,
a Florida corporation
Ackerley Communications of Massachusetts,
Inc., a Massachusetts corporation
Ackerley Communications of the Northwest,
Inc., a Washington corporation
Ackerley Realty, Inc.,
a Washington corporation
Adshelters, Incorporated,
a Florida corporation
Empire Outdoor Advertising, Inc.,
a Florida corporation
Empire Outdoor Advertising of Massachusetts,
Inc., a Massachusetts corporation
Empire Outdoor Advertising of the Northwest,
Inc., a Washington corporation
KGET TV, Inc.,
a Washington corporation
KJR Radio, Inc.,
a Washington corporation
KKTV, Inc.,
a Washington corporation
Seattle SuperSonics, Inc.,
a Washington corporation
T.C. Aviation, Inc.,
an Oregon corporation
WIXT TV, Inc.,
a Washington corporation